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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 482.

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, *et al.*,

Petitioners,

vs.

JACOB PERKO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR RESPONDENT.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR RESPONDENT.

RESTATEMENT OF QUESTION PRESENTED.

The question presented for review is as follows:

Whether the National Labor Relations Act precludes a State court from exercising jurisdiction in a tort action brought by a supervisor against the union to which he formerly belonged where he seeks damages (and not reinstatement) for an unlawful interference with his employment?

ADDITIONAL STATUTES INVOLVED.

Section 14 of the National Labor Relations Act as amended, 29 U. S. C. Section 164(a):

> "(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer

subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Other applicable sections of the National Labor Relations Act are set forth in the Petitioners' Brief on pages 2-5.

SUPPLEMENTAL STATEMENT OF THE CASE.

Without attempting to summarize the entire transcript of testimony presented at the second trial of this action, entitled "The Third Round" in Brief for Petitioners, certain additional portions of the testimony are pointed out to this Court.

The plaintiff, Jacob Perko, was employed as job superintendent for the William B. Pollock Company in the construction of a hot blast stove at the Ohio Works of United States Steel Corporation (R. 22-23). A job superintendent is the contractor's representative on the job, supervising the entire construction project for his employer (R. 127). As such, he gives orders and instructions to the foremen of the various crafts employed on the project (R. 22).

In December, 1953, the plaintiff claimed that his "foreman's rights" had been taken away from him by the defendant union (R. 60). "Foreman's rights" as used in the trial is the right and power to give orders covering journeyman ironworkers (R. 103). The ironworkers refused to take orders issued by plaintiff (R. 23, 24, 43, 44). The refusal to take orders from the plaintiff was observed by plaintiff's employer with the result that orders covering ironworkers had to be given to the ironworkers' foreman by a Mr. Francis N. Walsh, Field Superintendent for the William B. Pollock Company (R. 24).

Mr. Walsh was informed by the job steward that the ironworkers were not taking orders from plaintiff pursuant to orders from the union's Executive Board (R. 24). The steward said the men themselves would be fined if they followed plaintiff's orders (R. 27). The steward is the union representative on the job (R. 51).

Plaintiff attempted to remedy his difficulties with his union. He had been tried and fined for purportedly violating a union rule against assisting boilermakers (R. 54-55). Written charges of his misconduct were the basis for his being tried and fined (R. 164). He attempted to pay the fine but was informed by the union's business agent that the payment of the fine would not restore his "foreman's rights" (R. 66).

Plaintiff hired an attorney to obtain reinstatement by the union of his foreman's rights (R. 60). The attorney was ignored by the union (R. 77-78).

No explanation of its action toward plaintiff was offered at the trial court level. In fact, the union officials denied doing anything that would affect plaintiff's foreman's rights (R. 97, 109, 122, etc.) They stated that they had no right to do anything that would affect his foreman's rights (R. 56), and that their Constitution prohibited such type of conduct (R. 56).

The Record also contains evidence as to the damages suffered by plaintiff and his attempts to mitigate damages by securing other employment.

Plaintiff's employer terminated his employment since he could no longer work as job superintendent because of his dispute with the union (R. 37).

It is interesting to note that plaintiff was charged with an offense that he committed two days *after* the charges were reduced to writing.

ARGUMENT.

Introduction.

Counsel for Respondent have restated the question of law presented by this appeal so that the actual question to be determined by this Court will not be obscured. There are two material factual differences in the question as restated: (1) the inclusion of the fact that plaintiff, at the time of the union's wrongful act, was employed as a "supervisor," and, (2) the omission of any motive or objective for the union's securing the discharge of plaintiff from his employment, the former being contained in the Record and the latter being noticeably absent from the Record.

With these two factual differentiations, a major portion of Petitioners' argument need not be discussed since the questions taken up by Petitioners are not presented by this appeal.

For the reasons stated above, counsel for Respondent have also supplemented Petitioners Statement of the Case by various references to the transcript of the testimony taken at the trial and contained in the Transcript of Record before this Court.

I.

Applicability of The National Labor Relations Act.

Section 2(3) of the National Labor Relations Act, as amended, 29 U. S. C. Section 152(3), defines the term "employee" and specifically provides that the term employee shall not include any individual employed as a supervisor. Section 2(11) of the Act, 29 U. S. C. Section 152 (11), defines the term "supervisor." The Act itself deals with "employees" and "labor organizations" and does not purport to deal with supervisors.

The Congressional purpose behind the exclusion of supervisors from the scope and operation of the Act is disclosed by the comments of Senator Taft and Senator Flanders. The reasons for removing the supervisory force from the area of collective bargaining are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost the control of his business. He cannot run it effectively. 93 Cong. Rec. 4804.

Was Plaintiff a supervisor under the Act? If this question is answered in the affirmative, no further review of this action is appropriate. It must be conceded that supervisors, being excluded from the scope and operation of the Act, must turn to other tribunals such as state courts to seek protection of their property rights, including the right to employment free from unjustified interference by

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The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They must follow orders of the employer or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally required to do the basic work they performed before the passage of the Wagner Act.

It is not very difficult for management to prove, as a part of management, that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various intermediate steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate foremen's unions not affiliated with the main unions, but it was found that that was almost impossible, that there was always an affiliation of some sort, that foremen, in order to be successful as a "boss" must have the support of the employees above. A plant can promote other men to be foremen if necessary. The trouble with the employees is inevitable. The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States. 93 Cong. Rec. 3952.

third persons. At this point, the doctrine of pre-emption cannot with logic even be suggested since pre-emption arises from conflict. There can be no conflict with a Federal law that specifically excludes supervisors from its scope and operation.

Factually, then, was Plaintiff a supervisor under the Act when the tort was committed—when the union, without justification, interfered with his contract of employment?

> Record, pages 22, 23. Plaintiff was job superintendent at the Ohio Works (U. S. Steel Corp.) for his employer, The William B. Pollock Company.
>
> Record, page 22. A job superintendent is responsible for directing more than one craft.
>
> Record, page 127. A job superintendent is the representative of the contractor and is in charge of all the work the contractor has on the job.
>
> Record, pages 90, 91. A job superintendent is not a member of the bargaining unit, his wages not being covered in the collective bargaining agreement.
>
> Record, page 37. The Plaintiff's employment as job superintendent was terminated because he could not work as job superintendent due to his dispute with the union.

Petitioners concede that "it is fairly clear from the record that a 'superintendent' is a supervisor within the meaning of Section 2(11)" of the Act (Brief for Petitioners, page 20). The defendant union, in response to plaintiff's petition, filed an amended answer denying all the allegations in plaintiff's petition and alleging a "Sec-

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The Record also discloses that plaintiff sought work as "foreman" or "pusher" after being removed from his employment as job superintendent. This was offered only as evidence as to plaintiff's duty to mitigate damages. In fact, the Record discloses plaintiff's employment in other job capacities. This should not be confused with the elements of the tort complained of—a wrongful interference with plaintiff's employment as job superintendent for the William B. Pollock Company.

ond Defense:" "* * * that any conduct in which they may have engaged with respect to the William B. Pollock Company, and the plaintiff's employment as a *superintendent or supervisor* for that company was within the protection of Section 7 of the National Labor Relations Act * * *" (Emphasis added). (R. 12).

The Supreme Court of Michigan, in sustaining a default judgment against a union after the union specifically pleaded the lack of jurisdiction of the state court, commented: "That burden rests on the affirmative pleader, and our trial courts are not to be toyed with by the practice of depositing such a pleading and then ignoring the court. Which is to say that this defendant labor union should have presented proof in support of its jurisdictional plea if possessed of such proof." *Haenlein v. Saginaw Building Trades Council, et al.*, 361 Mich. 263, 269, 105 N. W. 2d 166, 169 (1960); cert. denied, 305 U. S. 816 (1961).

Plaintiff, at the time of the tort, was a supervisor. As a supervisor, plaintiff was exempt from the provisions of the Act, and by being exempt, he could not claim protection under the Act even though he was a union member. The record is unequivocal as to plaintiff's status as a supervisor and Respondents admit his status both in the answer filed at the trial level and in their brief filed in this Court.

It is submitted that the trial court correctly exercised jurisdiction over the subject matter of this action.

II.

The Type of Conduct Involved in "Perko v. Local 207."

The fact that plaintiff was a supervisor did not prevent him from being a union member.[1] As a union member, plaintiff must abide by union rules or risk loss of union membership. However, the courts have consistently

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[1] 29 U. S. C. § 164(a).

held that there can be no discriminatory discharge or unfair labor practice as to union conduct directed toward supervisors.[1] "The law is clear that a supervisor is not entitled to protection afforded ordinary employees under the National Labor Relations Act, and as to supervisors there can be no such thing as a discriminatory discharge or an unfair labor practice." *N. L. R. B. v. Fullerton Publishing Company,* (C. A. 9), 283 F. 2d 545, 551 (1960), citing *L. A. Young Spring & Wire Corp. v. N. L. R. B.,* 163 F. 2d 905 (1947), *cert denied,* 333 U. S. 837, and others.

Similarly, the right of employees to engage in concerted activities for the purpose of mutual aid and protection is not unlimited in the sense that such right can be exercised without regard to rights of others and duties which may be owed to the employer. *N. L. R. B. v. Rockway News Supply,* 197 F. 2d 111 (1952). The hiring, discharging and conditions of employment of supervisory personnel are strictly the prerogative of management and concerted activity to influence the exercise of such prerogative is unprotected. *N. L. R. B. v. Ford Radio & Mica Corporation,* 258 F. 2d 457 (1958).

Petitioners assume throughout their brief that plaintiff's cause of action against the union is based on the fact that the union fined the plaintiff for violation of a union rule against assisting boilermakers. Petitioners explain that its action against the plaintiff was designed to preserve jobs for its members by securing the removal of a man

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[1] It is interesting to note that Petitioners, in their zealousness, claim that the union's conduct was "a concerted refusal to work" in an attempt to preserve their jobs, to force the employer, the William B. Pollock Company to assign particular work to their union rather than the boilermakers. This is a literal Section 8(b) (4) (D) violation and also a Section 303(a) (4) violation (as the Act was then worded) and actionable in any district court "or in any other court having jurisdiction of the parties" under Section 303(b) of the Act.

who was assigning work to a different craft, *ergo*, either arguably protected activity under Section 7 of the Act or prohibited activity under Section 8 of the Act. The statement that plaintiff's cause of action included plaintiffs being fined for violation of a union rule appears to be the major premise in petitioners' argument.[1]

This factual assumption is unjustified. Evidence was introduced at the trial by both sides to the controversy as to the trial of the plaintiff by the Executive Board of the union. However, counsel for defendant union requested that the court specifically instruct the jury as to this conduct on the part of the union, which request was granted, and the jury was instructed as follows:

> "Members of the jury, I charge you as a matter of law that the trial of Jacob Perko by the Executive Board of the Defendant Union on December 8, 1953, was an exercise of a lawful right of the Executive Board of the Defendant Union.
>
> "The findings and penalty of the Local Union as modified by the International Union cannot be questioned in this Court in this proceeding.
>
> "Therefore, the trial, the findings, and the penalty may not be used as evidence of a conspiracy by the Defendant Union against the plaintiff, Jacob Perko." (R. 168.)

At the trial the defendant union made no attempt to legitimate its conduct toward plaintiff, but instead flatly denied doing anything to hurt plaintiff. Counsel for Respondent do not feel that a brief in an appellate court is the time to speculate as to the union's motivation.

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[1] "* * * because he had violated the union's rule against assisting boilermakers * * *," Brief of Petitioners, page 19; "* * * because he refuses to comply with a union rule * * *"; "* * * for his violation of the union's rule against assisting boilermakers * * *," Brief for Petitioners, page 22; "* * * violated a union rule," Brief for Petitioners, page 23.

The trial court adequately and accurately instructed the jury as to the elements of a conspiracy both in its special instructions and in its general charge. It was made clear to the jury that the plaintiff, to sustain his allegations, must prove by a preponderance of the evidence the elements of a conspiracy "* * * that the acts be performed in furtherance of the *wrongful* purpose and be done by the conspirators *without any justification* on their parts." (R. 164.) "* * * and if you further find that such act or acts were *unjustified* * * *." (R. 167.) See also Record, page 172.

The type of conduct involved in this controversy between plaintiff and his union was determined by the unanimous verdict of a jury. Petitioners' entire argument that the union's conduct was also prohibited by the N. L. R. A. is based on factual allegations made only after the jury returned a verdict adverse to their cause.

III.

The Ohio Court's Ruling Is in Accord With Principles Established by the Supreme Court.

The record clearly shows that plaintiff's difficulty was a matter between plaintiff and his union. (R. 38.) The union conduct was directed at plaintiff's continued employment as job superintendent. It did not involve conduct of plaintiff's employer toward the ironworkers, pending requests for assignment of particular work, grievances, collective bargaining, or a labor-management dispute. Thus, the unlawful union conduct was in an area peripheral to the purposes of the National Labor Relations Act, whose concern is relations between unions and employers, not between unions and their members.

Congress has not restricted the power of a union to select its members. In fact, Congress took special pains

to make clear that the restraints on unions imposed by the National Labor Relations Act did not permit the NLRB to regulate union membership requirements.

Section 8(b)(1)(A) of the Act provides:

> "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7; *provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein* * * *." (Emphasis added.)

Legislative concern with the narrow question of whether the language of Section 8(b) would be construed to restrain union membership policies is demonstrated by the following exchange in the Senate:

> "The Acting President pro tempore. The chair understands that the Senator from Florida has withdrawn his previous amendment, and is now offering another amendment, which will be stated.
>
> "The Chief Clerk. It is proposed to amend the so-called Ball amendment by inserting after the figure '7', the following: Provided, that this subsection shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.
>
> "Mr. Ball. I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. *It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions.* The amendment of the Senator from Florida makes that perfectly clear. (Emphasis added.)"

II Legislative History of the Labor-Management Relations Act of 1947, 1141-42 (1948).

The NLRA provides that the NLRB is not to use either Section 8(b)(1) of the NLRA or any other subsection of Section 8(b) as a basis for regulation of union membership. Congress simply excluded an administrative agency which was specifically charged with other tasks from affecting union membership policies. A broader reading of Section 8(b)(1) is not justified.

A broad reading of the proviso to Section 8(b)(1) which would have foreclosed state jurisdiction over expulsion from unions was rejected by the Supreme Court in *International Ass'n of Machinists v. Gonzales*, 356 U. S. 617 (1958).

The Supreme Court in the *Gonzales* case stated:

> "But the protection of unions members in their rights as members from *arbitrary conduct* by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied.
>
> "The proviso to Section 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein' * * * 61 Stat. 141, 29 USC Sec. 158(b)(1). The present controvery is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for '*retention of membership* therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United*

Constr. Workers v. Laburnum Constr. Corp., 347 U. S. 656, 98 L. ed. 1025, 74 S. Ct. 833." Id. at p. 620.

"Although, if the union's conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is hereby presented, deprive a party of available state remedies for all damages suffered. See *International Union, United A. A. A.-I. W. v. Russell*, 356 U. S. 634, 2 L. ed. 2d 1030, 78 S. Ct. 932.

"If, as we held in the Laburnum case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the NLRB, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interests expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under Section 8(b)(2). This important distinction between the purposes of

> the federal and state regulation has been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination after union ouster from membership. The State Court proceedings deal with arbitrariness and misconduct vis-a-vis the individual unions members and the union; the Board proceeding, looking principally to the nexus between the union action and employer discrimination, examines the ouster from membership in entirely different terms.' *Isaacson, Labor Relation Law; Federal Versus State Jurisdiction,* 42 ABAJ 415, 438." (Emphasis supplied.) Id. at pp. 621-623.

The opinion in the *Gonzales* case, looked upon with favor in the *Garmon* case,[1] makes it clear that the acts complained of in the instant case are of the same peripheral nature as those spoken of in the *Gonzales* case. In fact, the acts in the instant case seem far more remote from conflict with Federal policy than those in the *Gonzales* case.

In the latter case of *Garmon,* the Supreme Court recognized the validity of its prior decision in *Gonzales* (p. 241 and p. 243):

> "As we pointed out the other day, the statutory implications concerning what has been taken from the states and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation. *International Association of Machinists v. Gonzales,* 356 U. S. 617, 619."

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[1] *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959).

> "However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. *International Association of Machinists v. Gonzales,* 356 U. S. 617."

The conduct before this Court is a "mere peripheral concern" of the National Labor Relations Act because, as in the *Gonzales* case, the dispute arises not against a background of employer-union conflict, but one of union-member conflict. That respondent performed management functions does not make the present dispute a labor-management dispute. The union's objection was to respondent as an individual. And respondent would be unacceptable to the union as a supervisor regardless of the employer for whom he might work. For that reason, respondent has sought his remedy in damages at common law and has completely removed himself from the field of labor relations.

CONCLUSION.

Plaintiff, as a supervisor, does not have recourse to any protective measures of the National Labor Relations Act. A right so fundamental as the right to be secure in one's field of work cannot be collaterally extinguished by an Act that does not afford plaintiff any protection.

The union, on appeal, has built its argument on assumptions not supported by the record. The cause before this Court is not a hypothetical discussion of the purview of a Congressional enactment. The scope of this Court's

inquiry must be limited to the facts presented to the Court at the trial level, unextended and unembellished by counsel.

Respectfully submitted,

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